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JOSEPH F. SPANIOL, JR.
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No. 85-998

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

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55 pp

REVISED QUESTION PRESENTED

Whether the area near a barn located well outside a fence that surrounds a ranch house is part of the "curtilage" of that house.

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STATEMENT

There have been several developments in this case subsequent to the time that our petition was prepared.[1] On December 9, 1985, two opinions were

[1] The government's petition for rehearing was first denied on September 11, 1985. That order was later suspended, then reinstated on November 14, 1985 (see Pet. 2 n.1). The government filed its petition on December 10, 1985, the latest date permitted under the Rules of this Court. (At the time the petition was filed, the government had not yet received the December 9 opinions dissenting from denial of rehearing en banc.)

entered, joined by a total of four judges, dissenting from denial of rehearing en banc (App., *infra*, 38a-45a, 46a). On December 16, 1985, another opinion was entered, joined by two other judges, also dissenting from denial of rehearing en banc (*id.* at 47a). On January 17, 1986, the panel entered an order recalling and vacating the judgment that had been entered in this case on July 16, 1985 (*id.* at 48a).

On February 4, 1986, the court vacated the opinion of September 11, 1985, which had formed the basis for the instant petition, and reinstated its opinion of May 7, 1982 (674 F.2d 1093; Pet. App. 16a-35a). See App., *infra*, 49a-51a. The 1982 opinion had previously been vacated by this Court and remanded for reconsideration in light of *Oliver* v. *United States*, 466 U.S. 170 (1984). The court of appeals explained in its brief order (App., *infra*, 50a): "Upon further collegial consideration of the mandate of the Supreme Court in the course of the disposition of the government's petition for rehearing with suggestion for rehearing en banc, we have determined that the holding and teachings of *Oliver* v. *United States* neither direct nor require that the subject barn be found to be outside the curtilage of the Dunn ranch house."[2] After reexamining the facts, the court, "[u]pon studied reflection," concluded that "the barn was inside the protected curtilage" (*ibid.*).

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[2] In its original opinion on remand the court had stated that "[t]he lessons of *Oliver* are clear as applied to a part of the instant inquiry" (Pet. App. 6a) and concluded that the agents did not violate the Fourth Amendment in approaching the barn and that the barn was not within the curtilage (*id.* at 6a-8a).

REASONS FOR GRANTING THE PETITION

1. The court of appeals' latest order has changed the nature of the question presented in this case. The decision below no longer stands for the proposition that a government official is prohibited from looking into an enclosure while standing in a place to which the public has access. Instead, the court of appeals has held that the police here violated the Fourth Amendment by *approaching* respondent's barn because that approach entered into an area characterized by the court as "curtilage"—one in which the respondent had a protected expectation of privacy. As discussed in our petition for certiorari (No. 82-508) from the 1982 judgment and opinion that has now been reinstated by the court of appeals, the court could not have found that the area near the barn was "curtilage" in the traditional sense because it did not suggest any way in which that area was associated with a residence. Indeed, that area was separated from the residence by a fence (see 674 F.2d at 1099). The map attached to the court of appeals' most recent opinion (App., *infra*, 51a) plainly shows that the drug laboratory was situated a considerable distance from the area surrounding the house that would ordinarily be thought of as curtilage. Rather, the court found that the officers' entry here violated an expectation of privacy because the officers crossed two fences to reach it—one of which was a perimeter fence enclosing the entire 198-acre Dunn ranch (674 F.2d at 1100).[3] It is clear from *Oliver* that this analysis is erroneous; a perimeter fence around an

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[3] Because the court laid no particular stress on the existence or nature of the second fence, presumably the court of appeals regards the entire 198 acres as "curtilage."

open area does not alter its status as an "open field" for Fourth Amendment purposes.

2. The court of appeals' decision in its present form marks a radical departure from settled legal principles. While there may be some uncertainty about the meaning of "curtilage" in other settings, this case represents the prototypical situation in which the doctrine evolved, for the boundaries of the curtilage here are "clearly marked" (*Oliver*, 466 U.S. at 182 n.12) by the fence surrounding the residence. Where a large ranch contains a residence surrounded by a fence, the area within such a fence is ordinarily considered "the area around the home to which the activity of home life extends" (*ibid.*); the rest of the ranch is not "associated with the 'sanctity of a man's home and the privacies of life' " (*id.* at 180, quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)) and therefore it is not part of the curtilage.

By applying the term "curtilage" to an area a considerable distance from a fence that *separates* it from the house, the court of appeals has cast the scope of the "open fields doctrine," recently clarified by this Court, into considerable confusion. For the law enforcement officer in the field, the situation is intolerable. He simply cannot predict with any confidence whether a privately-owned area that clearly appears to be an open field under this Court's recent decision in *Oliver* will ultimately be judged to be "curtilage" by the Fifth Circuit and therefore whether an entry into that field will be judged to be violative of the Fourth Amendment.[4]

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[4] We note that whatever the merit of the court of appeals' radical new interpretation of the "curtilage," it is surely unreasonable, as a matter of exclusionary rule policy, to suppress the evidence seized in this case on the basis of that

3. Moreover, quite apart from the merits of the court of appeals' new decision, the process through which it was entered warrants this Court's attention. This is not a case in which the court of appeals simply rendered a decision that is clearly at odds with Supreme Court precedent. Rather, the court of appeals has reinstated a decision that had been vacated by an order of this Court because of an intervening decision. The court of appeals has taken this action without any explanation of why that decision is not controlling and in the face of its own prior recognition that "[t]he lessons of *Oliver* are clear as applied to [the curtilage] inquiry" (Pet. App. 6a). When a decision of a court of appeals is vacated by this Court, the integrity of the hierarchy of the judicial system is implicated by a decision simply reinstating that opinion with little or no explanation. See *Florida* v. *Rodriguez*, No. 83-1367 (Nov. 13, 1984); *Hutto* v. *Davis*, 454 U.S. 370, 374-375 (1982). This consideration may make it necessary for the Court to grant certiorari a second time in order to ensure that a lower court complies with the terms of a remand. See *Sumner* v. *Mata*, 455 U.S. 591, 597-598 (1982).

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interpretation. At the time the officers in this case entered respondent's ranch they could not conceivably have suspected that they were entering onto the curtilage. The purposes of the exclusionary rule are not served by invoking a new rule to suppress evidence seized by police officers acting in good faith in accord with the law in existence at the time. See *United States* v. *Johnson*, 457 U.S. 537, 549-550 (1982); cf. *United States* v. *Leon*, No. 82-1771 (July 5, 1984); *Michigan* v. *DiFillippo*, 443 U.S. 31 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1986

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Texas

(November 14, 1985)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 16, 1985, 5th Cir. 1985, 766 F.2d 880)

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM.

A member of this court having requested a poll on the suggestion for rehearing en banc, the order dated September 11, 1985 denying rehearing and rehearing en banc was suspended. The poll was taken and a majority of the judges in active service having voted against a rehearing en banc, the petition for rehearing with suggestion for rehearing en banc is DE-

NIED; further, the order denying the petition for panel rehearing is reinstated and said petition is herewith DENIED.

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, and JONES, Circuit Judges *.

(Dissents filed December 9, 1985)

E. GRADY JOLLY, with whom THOMAS GIBBS GEE, W. EUGENE DAVIS, and EDITH H. JONES, Circuit Judges, join dissenting:

I respectfully dissent from the denial of the petition for rehearing *en banc*. First, I do not view the panel opinion as consistent with *Oliver v. United States*, 104 S.Ct. 1735 (1984). Second, I do not think the barn in this case is a structure entitled to fourth amendment protection. Third, even if we assume it is entitled to fourth amendment protection, there was no fourth amendment intrusion that taints the evidence because the contraband was discovered by looking into the open barn from the outside.[1] Fourth, I respectfully submit that the panel opinion is contrary to our precedent. *United States v. Williams*, 581 F.2d 451 (5th Cir. 1978). And, finally, the panel opinion unnecessarily creates a conflict with the Eleventh Circuit. *United States v. Long*, 674 F.2d 848 (11th Cir. 1982). For these reasons, I dissent.

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* Judge ROBERT M. HILL did not participate in the reconsideration of the suggestion for rehearing en banc.

[1] Even upon discovery of the contraband the agents did not enter the barn. Rather they simply used the information obtained by their unintrusive observation to procure a search warrant pursuant to which they entered the barn and seized the contraband the next day.

In this case DEA agents trailed codefendant Carpenter to defendant Dunn's Texas ranch, after Carpenter bought equipment typically used to manufacture illegal phenylacetone. The DEA agents crossed a number of fences on their way to the larger barn. At the larger barn, they walked around the back and sides, but they could not see in. They walked to the front of the larger barn, which was enclosed by a wooden fence. They scaled this fence, and approached the open front of the barn. The barn front was blocked by a waist-high wooden fence, and so the agents stopped and peered through mosquito netting into the barn with the aid of a flashlight. There they saw the illegal phenylacetone equipment. Thus, as I discuss later, *no fourth amendment intrusion ever occurred to bar the admission of the subject evidence.*

Nevertheless, on the basis of these facts the panel initially held, *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982), that the defendants had an expectation of privacy with respect to the barn because it was within the curtilage of the residence, was not visible from the road, and was protected by perimeter and interior fences.

The Supreme Court granted certiorari, vacated the panel opinion, and remanded for reconsideration in the light of the Court's opinion in *Oliver v. United States*, 104 S. Ct. 1735 (1984).

Oliver held that *Katz v. United States*, 389 U.S. 347 (1967), with its emphasis on the reasonable expectation of privacy under the fourth amendment, did not impair the doctrine enunciated by Justice Holmes in *Hester v. United States*, 265 U.S. 57 (1924), that open fields do not enjoy fourth amendment protection. The Court noted that fences and no-trespassing signs do not effectively bar the public from viewing open

fields in rural areas. *The fact that the government agents may have committed a trespass at common law does not mean that the agents' intrusion upon an open field constitutes a "search" in the constitutional sense.* *Id.* at 1743. Nor does the right conferred by trespass law to exclude persons embody a privacy interest protected by the fourth amendment. *Id.* at 1744 n.15. Applied to this case, *Oliver* held *that the agents had the right to be where they were when they saw the contraband from outside the barn.*

On remand the panel held, upon reconsideration, that the barn was not within the constitutionally protected curtilage of the ranch house. Thus, the panel implicitly concedes that the barn is a structure in an open field. Yet, *Oliver* notwithstanding, the panel concluded that "the agents' action in crossing two fences alongside and around the barn, and going under the front overhang of the barn to a position immediately adjacent to an inset wall and, with the aid of a flashlight, peering through the barn's front fishnet covering to view its contents . . . violated the fourth amendment. . . ."

The panel distinguishes *Oliver* as follows:

> The effect of their circling the large barn, being unable to see inside through the back or sides, climbing a wooden fence at its front, entering its overhang and going into the immediate proximity of the fish net and wooden gate front enclosure, is not so informed by *Oliver*'s lead and nudge.

The panel's reasoning halts course in mid-air by concluding however, that the barn was not within the protected curtilage but rather (it must be assumed) in an unprotected open field. The panel thus effectively recognizes that *Oliver* precludes the general holding that a barn in an open field is protected, and

proceeds to adopt a different analysis and arrive at a novel holding: the barn in the open field is a commercial building:

> A barn is as much a part of a rancher's place of business as a warehouse or outbuilding is part of an urban merchant's place of business. It is and ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy.

I find this holding to be flawed in at least three respects. First, the general purpose of a barn does not lend itself to the same rationale as a commercial building. Unlike a commercial building, a barn is not secure. It offers little privacy against those who would pass by. It houses animals, not "persons," "papers," and "effects." Its fences keep animals in, not people out. Persons in a barn have, or should have, little expectation of privacy.

Second, the proposition that an owner or occupier may base his constitutional right to privacy on subjective expectations is contrary to the principle reiterated in *Oliver*. The Court made clear that the fourth amendment does not protect the subjective expectation of privacy, but only "those expectations society is prepared to recognize as 'reasonable.'" The test of legitimacy of the search is not whether the individual chooses to conceal his private activity,

> rather the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the fourth amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

Oliver, 104 S. Ct. at 1743.

Third, the cases cited in *Dunn II* that purport to support the characterization of a barn as a commercial building, I respectfully suggest, are inapposite. None involves a structure on a farm. Furthermore the cases involve either intrusive searches into commercial buildings (there was no intrusion into the building here) or searches of effects (not apposite here) rather than a building.

Aside, however, from whether the defendant had a reasonable expectation of privacy in the *structure* that would prevent the officers from entry without a warrant, the fact remains that, because the officers were *not* on the curtilage and because the structure in question is conceded to be in an "open field," the officers had the right to be where they were: outside the barn. It was from this vantage point that they observed the contraband, and consequently the discovery of the contraband, later used to obtain a warant, was not a violation of the fourth amendment. Thus, in any event, the evidence suppressed by the panel is not unconstitutionally tainted even if the defendants had an expectation of privacy in the barn as a commercial building.

This conceptual difference of how the structure should have been treated, however, is not the only concern that I have with the panel's holding. The opinion conflicts with, and is contrary to our precedent. Our opinions have uniformly held that structures on a farm constitute either: part of the curtilage, entitled to fourth amendment protection; or, an open field structure, not entitled to fourth amendment protection.

In *United States v. Williams*, 581 F.2d at 451, a case I find very difficult to distinguish from the facts in this case, the court (Gee, J.) held that agents who

trespassed through the open fields of the defendant, trespassed the defendant's curtilage, and detected the odor of contraband emanating from a shed, next to which they were standing, did not violate the defendant's fourth amendment rights. We held that there was no violation notwithstanding that the shed was on the curtilage and the agents trespassed the curtilage before detecting the odor.

Here, the government agents trespassed through open fields, but never trespassed on the curtilage. They approached a farm building where, while standing on the outside of the building, they observed the contraband. *Williams*, it seems to me, controls: there was no fourth amendment violation. Indeed, the defendant in *Williams* makes a stronger case for fourth amendment violation than does the defendant here because the contraband (1) was detected there as a result of the trespass on the curtilage and (2) was in a shed clearly protected by the fourth amendment as part of the curtilage.

Moreover, the panel opinion, in overruling our precedent, creates a conflict with our sister circuit. In *United States v. Long*, 674 F.2d at 848, the government agents trespassed open fields, approached a barn in an open field, and looked through its open doors to observe the contraband. The Eleventh Circuit, relying on Fifth Circuit law, stated:

> The former Fifth Circuit has held that there is no legitimate expectation of privacy in outbuildings and open fields, even if fenced, unless they are part of the curtilage, or the immediate appurtenances of a home. *United States v. Williams*, 581 F.2d 451, 453-54 (5th Cir. 1978), *cert. denied*, 440 U.S. 972, 99 S. Ct. 1537, 59 L.Ed.2d 789 (1979); *United States v. Brown*,

473 F.2d 952 (5th Cir. 1973); *Hodges v. United States*, 243 F.2d 281, 283 (5th Cir. 1957).

Long, 674 F.2d at 853. It therefore appears clear to me that the panel opinion has the effect of overruling prior precedent.

Finally, as a practical matter, I dissent from the denial of rehearing en banc because many drug operations use farms and farm structures, and this opinion introduces a new rule obstructing the government in its battle with drug offenders. Apparently, government agents cannot now look into open farm structures without a warrant, a protection even *greater* than that usually afforded to true commercial buildings. Such a departure from precedent, introducing a new rule expanding fourth amendment protection that will have significant impact on law enforcement, should, for its practical effects, be considered enbancworthy. I therefore respectfully dissent from this court's decision to deny rehearing en banc.

GEE, Circuit Judge, Dissenting:

I join wholeheartedly in Judge Jolly's dissent, adding only a word to emphasize the concerns expressed in his concluding paragraph. It has been observed in a slightly different context that judges read the newspapers. Doing so, I have noted more than one recent item recounting drug purveyor's boasts that by the use of concealed greenhouses and similar isolated structures they are increasingly able to evade the efforts of lawful authority to control their traffic in poison. The unfortunate and unintended effect of the panel opinion will be to abet this trend. Isolate, fence, and camouflage your greenhouse, we say, and —curtilage or no curtilage—the Fourth Amendment protects it. 766 F.2d 880.

A more unfortunate result, in real-world terms, can scarcely be imagined. Were that result compelled by an iron logic or by relevant Supreme Court authority, we would be bound to reach it regardless of consequences. Judge Jolly's dissent shows that neither is the case.

APPENDIX G

(Filed December 16, 1985)

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom THOMAS M. REAVLEY, Circuit Judge, joins dissenting:

I join Judge Jolly's dissent insofar as it urges that the barn was not "searched" within the meaning of the fourth amendment. The barn was in an open field, and the officers did not transgress the Constitution when they walked up to it. The panel, despite its denial, has created a curtilage around a barn in an open field. That is inconsistent with the teaching of *Oliver v. United States*, 104 S.Ct. 1735 (1984).

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

[Filed Jan. 17, 1986]

Appeal from the United States District Court for the Western District of Texas

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Before WISDOM, POLITZ, and TATE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the judgment of this Court entered on July 16, 1985 and issued as mandate on November 26, 1985 is recalled and vacated. The Court will enter a new judgment in this cause in due course.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Texas

(February 4, 1986)

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

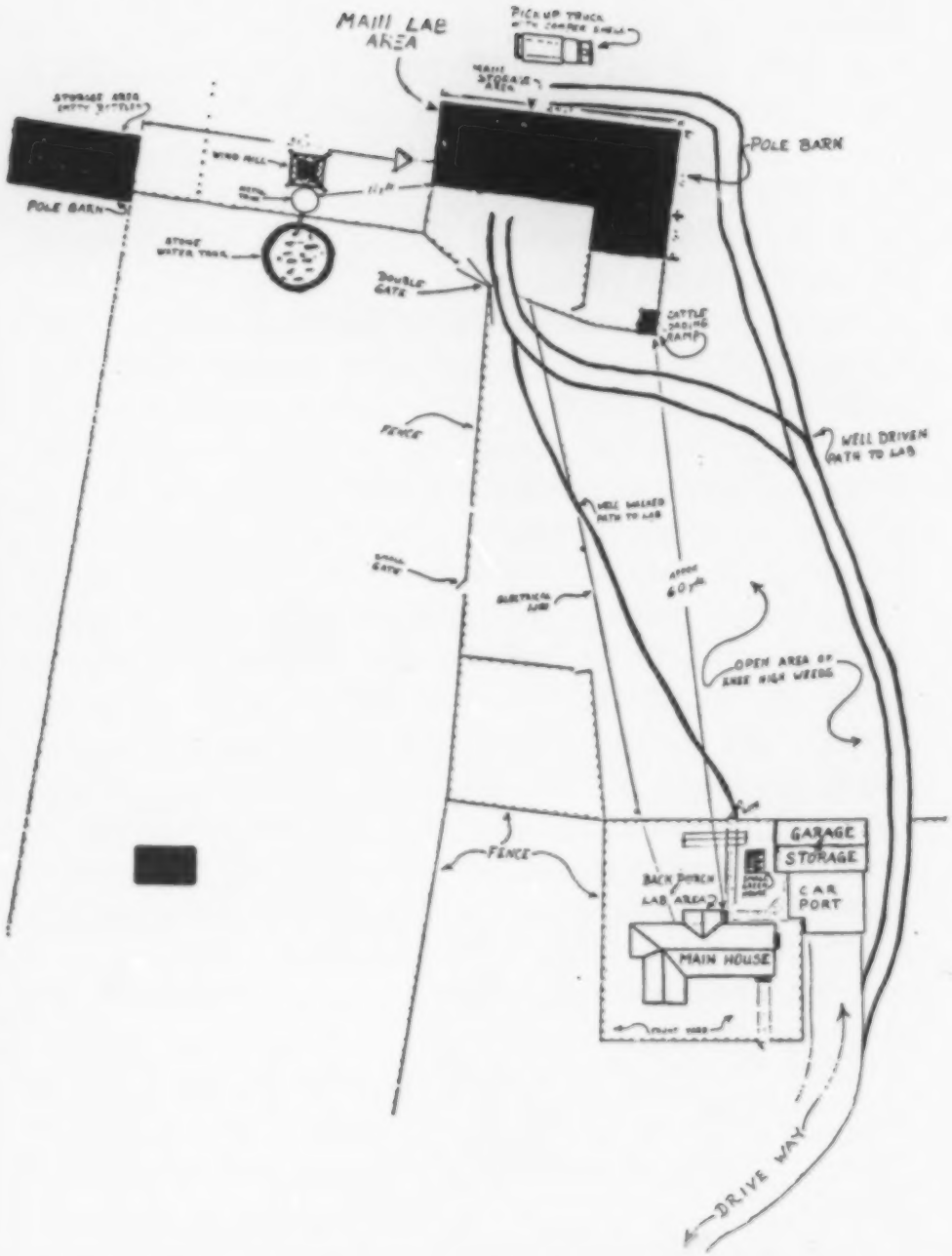
Upon first consideration of this appeal we reversed the convictions of Ronald Dale Dunn finding, *inter alia*, that a barn which was the subject of a warrantless search was within the protected curtilage of the Dunn ranch house. *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982). The Supreme Court granted the government's petition for writ of certiorari, *United States v. Dunn*, 467 U.S. 1201, 104 S.Ct.

2380, 81 L.Ed.2d 340 (1984), and vacated our disposition of Dunn's appeal, remanding "for further consideration in light of *Oliver v. United States*," 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). On remand we held that the barn in question was not within the curtilage, *United States v. Dunn*, 766 F.2d 880 (5th Cir. 1985). By an Order dated January 17, 1986, we vacated that opinion and returned the matter to the panel.

Upon further collegial consideration of the mandate of the Supreme Court in the course of the disposition of the government's petition for rehearing with suggestion for rehearing en banc, we have determined that the holding and teachings of *Oliver v. United States* neither direct nor require that the subject barn be found to be outside the curtilage of the Dunn ranch house. We again have examined painstakingly the facts reflected in this record, as set forth in detail in our two prior panel opinions, against the backdrop of *Oliver v. United States* and other decisions of the Supreme Court and of this court. To reflect the relative positions of the buildings and improvements, we attach a site plat of the ranch house enclave which was filed in evidence as a government exhibit. Upon studied reflection, we now conclude and hold that the barn was inside the protected curtilage.

Accordingly, we reinstate the opinion rendered on May 7, 1982, reported at 674 F.2d 1093 (5th Cir. 1982), as our disposition of this appeal by Ronald Dale Dunn.

PRIOR OPINION REINSTATED.



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APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

D. C. Docket No. A-80-CR-89

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Texas

---

Before WISDOM, POLITZ, and TATE, Circuit Judges.

JUDGMENT

Upon further consideration of the mandate of the Supreme Court following the vacation of the opinion of this Court of July 16, 1985 rendered following the Supreme Court's mandate, IT IS ORDERED AND ADJUDGED by this Court that the prior opinion of this Court rendered on May 7, 1982, is reinstated; and the judgment of conviction of Ronald Dale Dunn in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of May 7, 1982.

February 4, 1986

Issued as Mandate:

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20099